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No. 83-1255

In The

Supreme Court of the United States

October Term, 1983

STEPHEN J. HACKER,

Petitioner,

vs.

THE FIFTH THIRD BANK,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the District Court violated Petitioner's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution when Petitioner received prior notice of the Receivership hearing on the day it was to be heard, Petitioner's counsel was present at that hearing, and Petitioner was afforded the opportunity at that hearing to present additional evidence on a later date at his request.

2. Whether the remedy of receivership was appropriate in this case, regardless of whether the courts below applied federal law or state law, when there was ample evidence to support the District Court's finding that Respondent's collateral was in danger of being lost, removed, or materially injured and that Respondent would be irreparably harmed unless a receiver was appointed.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Fifth Third Bank, Respondent herein, prays that the writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-mentioned case on November 29, 1983, be denied.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio was announced from the bench and is appended to this Brief in the Appendix. (App. 11)

The opinion of the United States Court of Appeals of the Sixth Circuit in Fifth Third Bank v. Stephen J. Hacker and SJH Enterprises, Inc. is unreported but is printed in Appendix A hereto, infra, at App. 1.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the United States Constitution and the Ohio Revised Code are involved in the questions presented:

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes:

Ohio Revised Code §2715.01. (App. 56-58)

Ohio Revised Code §2735. (App. 58-59)

Ohio Revised Code §2735.01(A). (App. 58-59)

Ohio Revised Code §2735.01(F). (App. 58-59)

STATEMENT OF THE CASE

The Petitioner, Stephen J. Hacker, is a resident of Florida. The Respondent, The Fifth Third Bank, is an Ohio corporation located in Cincinnati, Ohio.

On Wednesday, September 21, 1983, Respondent filed a complaint against Petitioner because he was in default under the terms of a promissory note which he executed on February 28, 1983. The outstanding principal balance on the note at that time was $2,345,273.92 plus interest. Petitioner also breached the terms of the security agreement he executed on November 1, 1982 and the extension agreement executed on June 23, 1983. The complaint also alleged a claim for relief against SJH Enterprises, Inc., the guarantor of said note. The complaint contained both a specific and a general request for relief.

Along with the complaint, Respondent filed a motion to appoint a receiver. In support of the motion was the sworn affidavit of George A. Schaefer, Jr., Senior Vice President of Respondent Fifth Third Bank.

The District Court set a hearing on the Respondent's motion for September 22, 1983 at 2:30 P.M. and notified Respondent late in the afternoon on September 21, 1983. Petitioner was notified of the hearing as soon as Respondent's counsel came into the office the next morning at 9:00 A.M., September 22, 1983. Petitioner filed a motion for a continuance which the District Court denied at the hearing.

At the hearing George A. Schaefer, Jr., Senior Vice President and loan officer of Respondent Fifth Third Bank, testified that Petitioner has been in default on the promissory note since May 31, 1983. (App. 25) The testimony and evidence also established that Respondent had a valid security interest in the note and that thirty-five mares were to be the collateral. (App. 24, 25, 26) In addition, thirteen syndicate shares, representing an undivided interest in certain stallions, also served as collateral for the note. (App. 24)

It had been agreed between Petitioner and Respondent at the time the note was executed that Petitioner would send Respondent the original thirty-five certificates of foal registration evidencing the ownership rights in the collateral. (App. 27) The testimony at the hearing also established that Mr. Schaefer had made repeated attempts to obtain from Petitioner the original certificates of registration. (App. 27) Mr. Schaefer testified that, to this day, the Respondent has received only two or three of the thirty-five original certificates. (App. 27,

28) Mr. Schaefer explained that without the certificates, there is a danger of the mares being sold. (App. 28)

The testimony also revealed that Respondent originally had received four or five of the thirty-five certificates. However, pursuant to the extension agreement dated June 23, 1983, Respondent sent two of the certificates to racetracks to accommodate Petitioner, under the condition that the certificates be returned as soon as the races were completed. (App. 27) Petitioner, however, has failed to return the two certificates and at present Respondent has only two or three of the certificates in its possession. (App. 28)

Furthermore, Mr. Schaefer testified that Respondent ascertained through its own investigations that some of the thirty-five horses have disappeared and that Respondent does not know what has happened to the collateral. (App. 27) Testimony also disclosed that several horses had been sold but that Petitioner failed to remit most of those proceeds to Respondent. (App. 26, 29, 31, 38, 39) The evidence also established that Respondent was to receive at least forty thousand dollars ($40,000) from the sale of "Hold Your Peace." (App. 30) However, at the time of the hearing, Respondent had not received any proceeds from that sale. (App. 31) It was further established that Petitioner has been totally uncooperative in trying to reach an amicable settlement. (App. 32)

From the foregoing evidence, the District Court concluded that the collateral was being disposed of, with very minor payments of principal being made on the note. (App. 40) To protect the collateral from further dissipation, the District Court granted Respondent's motion to appoint a receiver. The Court made it clear, however,

at the time of the hearing, that it was perfectly willing to set a subsequent hearing on terminating the receivership, (App. 42) and it wasn't until January 10, 1984, nearly four months later, that Petitioner requested one. (App. 54)

Subsequent to the appointment of a receiver by the District Court, SJH Enterprises, Inc. was dismissed from this action.

On Appeal, the Court of Appeals for the Sixth Circuit, in an unreported opinion, affirmed the decision of the District Court to grant the receivership. (App. 1-6) As for the Petitioner's claim that he didn't receive notice, the Sixth Circuit Court of Appeals ruled that Petitioner did in fact receive notice and his attorney was present at the hearing to represent him. (App. 3) Moreover, the trial judge had informed Petitioner that he would set a subsequent hearing for additional evidence at any time the Petitioner so requested. (App. 4)

The Court of Appeals ruled that the evidence supported the trial judge's finding of irreparable harm unless a received was appointed. (App. 4, 5) The Court observed that it was apparent from the record that the trial judge balanced the equities of the situation before appointing the receiver to administer and protect the property. (App. 5, 6)

Petitioner also claimed that Respondent's complaint was for a money judgment only and that, therefore, prejudgment attachment was his sole form of relief. (App. 5) The Appeals Court ruled that this claim was also without merit since Respondent had a properly perfected security interest in the collateral (App. 5) and that under Ohio law, the appointment of a receiver is an ap-

propriate remedy where the applicant has a right to, interest in, or lien upon the property in question. (App. 5)

The Court of Appeals also observed that, even as of the date of its opinion, Petitioner had yet to act on the trial judge's offer to set a hearing (App. 6) and accordingly affirmed the decision of the District Court. (App. 6)

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

The Writ of Certiorari Should Be Denied in that the Case Does Not Present a Substantial Constitutional Question.

The Sixth Circuit Court of Appeals found that there was ample evidence to support a finding of irreparable harm to Respondent unless a receiver was appointed.

In this regard, the Court of Appeals ruled that Petitioner was afforded adequate notice of the hearing on Respondent's motion to appoint a receiver. Not only was his attorney present at the hearing, who had an opportunity to present evidence on Petitioner's behalf, but the District Court informed Petitioner's counsel that he would set a subsequent hearing for additional evidence at any time Petitioner so requested.

The United States Supreme Court has repeatedly held that where only property rights are involved, mere postponement of judicial inquiry is not a denial of due

process, if the opportunity given for ultimate judicial determination is adequate. *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950); *Phillips v. Commissioner*, 283 U.S. 589 (1931); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974).

In this case, the hearing was not ordered *ex parte*, without prior notice or opportunity for a hearing. On the contrary, Petitioner received prior notice and, furthermore, was represented by counsel at the hearing. However, even if one were to assume that the proceedings were *ex parte*, it is clear that there was no denial of due process under the Fifth Amendment nor under the Fourteenth Amendment since the District Court informed Petitioner's counsel at the hearing that he would be afforded the opportunity to present additional evidence at a later time if he so requested. It was not until nearly four months later that Petitioner made such a request. Since due process of law requires no particular form of procedure as long as there is at some stage an opportunity for a hearing and a judicial determination, this case presents no substantial constitutional question with respect to procedural due process.

II.

The Writ of Certiorari Should Be Denied in that the Decision By the United States District Court and by the United States Court of Appeals for the Sixth Circuit Was Based on State Law, Independent of Any Federal Question.

Petitioner argues that the courts below failed to follow state substantive law in a diversity action as set forth in *Erie Railroad v. Thompkins*, 304 U.S. 64 (1938). Such is not the case, however, for several reasons.

First, in affirming the decision of the District Court, the Sixth Circuit Court of Appeals applied Ohio law in determining whether it was proper to appoint a receiver in this case. The Court of Appeals stated that since Respondent had a properly perfected security interest in the collateral, it was appropriate to appoint a receiver to protect the Respondent's interest in the collateral which secured the note. (App. 5) Under Ohio law, the appointment of a receiver is permitted where the applicant has a right to, interest in, or lien upon the property in question. *Hoiles v. Watson,* 117 Ohio St. 165, 157 N.E. 557 (1927). Respondent clearly satisfied this requirement by virtue of its properly perfected security interest in the collateral. By applying Ohio law, the Court of Appeals implicitly determined that Respondent could proceed under the receivership statutes in Ohio Revs. Code §2735.

Second, Petitioner's premise upon which each of his arguments is based is misplaced. This is not a case of pre-judgment attachment under Ohio Revs. Code §2715 but rather one brought pursuant to the Ohio receivership statutes under §2735. The District Court determined from the evidence presented at the hearing on September 22, 1983 that the collateral was being disposed of (App. 40) and that at the most, only minor payments from the proceeds had been applied to the note. (App. 40) Under Ohio Revs. Code §2735.01 (A), a receiver may be appointed on the application of a party who has a probable right to or interest in the property, fund, or proceeds and "when it is shown that the property or fund is in danger of being lost, removed, or materially injured." The District Court appointed the receiver in

order to protect the collateral rather than to apply that collateral to payment of a debt. (App. 20, 22) In fact, the District Court stated that the received would serve as protection not only for Respondent, but for Petitioner as well. (App. 20, 40)

The Court of Appeals disposed of Petitioner's claim that pre-judgment attachment was Respondent's only form of relief. The Court noted that a receivership was a proper remedy under Ohio law since Respondent was seeking to protect its collateral rather than to subject it to satisfaction of the debt. (App. 5)

Under Ohio law, the appointment of a receiver is proper, not only as outlined above, but "in all other cases in which receivers have been appointed by the usages of equity." Ohio Revs. Code § 2735.01(F). This boiler-plate language refers to the broad equity power of a court to appoint a receiver in order to protect property. *Hoiles v. Watson,* 117 Ohio St. 165, 157 N.E. 557 (1927). The Court of Appeals, in affirming the District Court, observed that the District Court balanced the equities in determining whether a receiver should be appointed. (App. 5) This balancing is required by necessity in any receivership proceeding as dictated both by Ohio case law and by the Ohio receivership statute § 2735.01.

In affirming the District Court, the Court of Appeals expressly applied federal law as well as state law in determining whether a receivership was appropriate in this case. The settled rule is that where the judgment of a court rested upon two grounds, one of which is federal and the other which is non-federal, the jurisdiction of the Supreme Court fails if the non-federal ground is adequate to support the judgment. *Fox Film Corp. v. Miller,*

296 U.S. 207, 210 (1935); *Jankovich v. Toll Road Commission*, 379 U.S. 487 (1965); *Edelman v. California*, 344 U.S. 357 (1953). This principle applies not only in cases involving state substantive grounds . . . but also in cases involving state procedural grounds. *Henry v. Mississippi*, 379 U.S. 443, 446 (1965).

Under federal law, the appointment of a receiver is within the sound equitable discretion of the trial court *Guy v. Citizens Fidelity Bank and Trust*, 429 F.2d 828, 833-834 (6th Cir. 1970); *Tennessee Public Co. v. Carpenter*, 100 F.2d 728 (6th Cir.), *cert. denied*, 306 U.S. 659 (1938); *Granader v. Public Bank*, 417 F.2d 75 (6th Cir.), *cert. denied*, 397 U.S. 1065 (1970). Under Ohio law, the standard is virtually identical since a receiver may be appointed not only when the property is in danger of being disposed of but also in all other cases in which equity has dictated that a receiver be appointed. Ohio Revs. Code §2735.01 (A) and (F). Balancing the equities necessarily involves discretion by a court. That discretion was properly exercised in this case, with the result being the same regardless of whether federal or state law is applied. Significantly, Petitioner's arguments before this Court are based upon Ohio law and as such, should not be heard. The Supreme Court must continually refuse "to decide a federal question in a case that might be controlled by a state ground of decision." *Bell v. Maryland*, 378 U.S. 226, 237 (1964).

In the present case, the Sixth Circuit Court of Appeals determined that the evidence supported a finding that Respondent's collateral was in danger of being disposed of and that Respondent would suffer irreparable injury if the receiver were not appointed. The granting

of a writ of certiorari is "not . . . warranted merely to review the evidence or inference drawn from it." *General Talking Pictures v. Western Electric*, 304 U.S. 175, 178 (1938). Additionally, the Court of Appeals ruled that the District Court did not abuse its discretion in appointing a receiver in that under State law the Respondent made the requisite showing of an interest in the subject property and that that property was in danger of being lost or removed. As such, the decision below is adequately grounded in state law and therefore is not cognizable in a writ of certiorari.

CONCLUSION

WHEREFORE, Respondent asks that this Court deny the writ of certiorari.

Respectfully submitted,

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